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IN THE COURT OF APPEALS OF INDIANA

STANFORD JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0709-CR-812
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0702-FC-020803

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Sr. Judge

Stanford Johnson appeals his convictions and sentences for battery as a class C felony[1] and criminal mischief as a class A misdemeanor.[2] Johnson raises two issues, which we revise and restate as:

I. Whether Johnson's due process rights were violated where the State failed to preserve evidence; and

II. Whether the trial court abused its discretion in sentencing Johnson.

We affirm.

The relevant facts follow. In the early morning hours of February 3, 2007, Mason Terpening went to Sheridan Park Liquors in Indianapolis to purchase alcohol. Terpening "went straight to the counter and asked for a bottle of liquor." Transcript at 21. Johnson approached Terpening and asked him for some money. Terpening, who did not know Johnson, told Johnson "I don't have your money; I don't owe you anything. Leave me alone." Id. at 18. Johnson told Terpening, "give me my money." Id. at 38. Terpening asked the clerk behind the counter to get Johnson away from him, and the store's employee called the police.

Johnson "sucker" punched Terpening in the mouth, and Terpening fell to the floor. Id. at 23. At that point, three of Terpening's teeth were knocked loose and one was chipped. Johnson started smashing several bottles of wine over Terpening's head and

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[1] Ind. Code § 35-42-2-1 (Supp. 2005) (subsequently amended by Pub. L. No. 99-2007, § 209 (eff. May 2, 2007); Pub. L. No. 164-2007, § 1 (eff. July 1, 2007)).

[2] Ind. Code § 35-43-1-2 (Supp. 2006) (subsequently amended by Pub. L. No. 216-2007, § 48 (eff. July 1, 2007)).

shoulders. Terpening got up and took a couple of steps away, but Johnson followed him, jumped on top of Terpening and began throwing cases of beer on top of Terpening. Johnson then walked out of the store and was later apprehended.

The store's night manager told the detective that the store was equipped with video surveillance. The video surveillance system "saves enough data for a couple of months and as the hard drive gets full, it takes the oldest information and records over it with the newest information." Id. at 44. A detective asked Jeffrey Linkon, the managing director of the company that owns Sheridan Park Liquors, to download the video of the incident to a disk. Linkon attempted to download the video to a disk, but "either the wrong disk was given" to the State or "somehow it got deleted." Id. The State was "unable to uncover the files that had been copied." Id. The prosecutor requested that Linkon make another copy, but by that time the surveillance system had automatically erased the master recording.

On February 6, 2007, the State charged Johnson with: (1) Count I, battery as a class C felony; (2) Count II, criminal recklessness as a class D felony;[3] and (3) Count III, criminal mischief as a class A misdemeanor.[4] The State later charged Johnson with being an habitual offender[5] and dismissed Count II, criminal recklessness as a class D felony.

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[3] Ind. Code § 35-42-2-2 (Supp. 2006).

[4] The charging information for Count III states:

> Stanford Johnson, on or about February 3, 2007, did recklessly, knowingly, or intentionally damage or deface property, that is: merchandise, that is: beverages for sale,

At trial, Johnson testified that he met Terpening at a hotel two hours before entering the liquor store and had smoked crack with Terpening. Johnson testified that he, Terpening, and Terpening's friend went to the liquor store because "the dope man didn't want the quarter . . . he just wanted dollars." Id. at 63-64. Johnson also testified that Terpening hit him outside the liquor store. The following exchange occurred during the direct examination of Johnson:

> Q You can tell the jury what happened when the three of you went into the liquor store.
>
> A Okay. We went into the liquor store but they wouldn't give me my money but the black guy that he was with was like, "Give me the money. Give me the money," and he put the quarters in there to get two dollars out of the quarters and then the black guy came and grabbed me from behind and tried to drag me out of the liquor store while Truman[6] kept telling me, "Shut the "f" up, shut the "f' [sic]

> and the sales floor, of another person, namely: Lechiam Enterprise Inc. DBA Sheridan Park Liquors, by breaking multiple beverage bottles on the head and face and arms of another person, breaking the bottles and causing human blood to spill in the sales area, resulting in a pecuniary loss of at least two hundred fifty dollars ($250) but less than two thousand five hundred dollars ($2,500); all of which is contrary to statute and against the peace and dignity of the State of Indiana.

Appellant's Appendix at 24.

[5] Ind. Code § 35-50-2-8 (Supp. 2005).

[6] The following exchange occurred earlier:

> Q Who hit you outside the liquor store?
>
> A Truman. . [sic] The white dude. He told me to get the "f" away from him. That's why . . . .
>
> Q You said, "Truman." Are you talking about the white man that testified here today?

up, get out this liquor store.." [sic] The whole time I am the victim in there yelling, "Call the police." It was two of them against one. If you had the tape you would have seen it.

Q Did you strike Mr. Terpening in any way?

A Yes, now when his friend couldn't get me out of the liquor store and let go of me from choking me half way to death, he let go of me and I walked up to where the lobby is, right in front of the rug, and Truman comes and stands right in front of me and he pulls out a knife and that's the honest to God truth. He pulls out a knife even though they didn't find it and he grabs me first. Now, I had a bottle in my pocket[.] I already been to the liquor store. I busted a twenty. I had a drink of my liquor.

Q Please stick on the path of what happened in the store.

A Okay. He pulls a knife and the locks [sic] one arm and then locks the other one because I was reaching for the dollar even though that was their change that we was coming to get the dollars for. I was reaching for the dollars. He took the arm and snatched it up so I couldn't get the money and held me, interlocked me, until his friend came and snatched the money and left the liquor store with the money.

Id. at 65-66. Linkon, the managing director of the company that owns Sheridan Park Liquors, testified that after viewing the videotape, he knew that Terpening, Johnson, and another male "walked in together." Id. at 37.

A The white man. He accused me of assaulting him. He assaulted me.

Q His name is Terpening. Is that right?

A Terpening? Yes.

Transcript at 64.

After a jury trial, Johnson was convicted as charged. At the sentencing hearing, Johnson argued, in part, that the fact that he acted under provocation was a mitigator.[7] The trial court found Johnson's mental health issues and upbringing as mitigators. The trial court found the following aggravators: Johnson's extensive criminal history; Johnson's probation had been revoked seven times; and the attack was unprovoked and extremely violent. The trial court sentenced Johnson to eight years for Count I, battery as a class C felony, and enhanced by eight years because of his habitual offender status. The trial court sentenced Johnson to one year for Count III, criminal mischief as a class A misdemeanor. The trial court ordered that the sentences for Counts I and III be served concurrently.

I.

The first issue is whether Johnson's due process rights were violated where the State failed to preserve evidence. Johnson argues that "[b]ecause a reasonable interpretation of the destroyed material evidence contained in the liquor store's 24-hour video surveillance evidence would support Mr. Johnson's assertion that he had acted in

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[7] Specifically, Johnson's attorney stated:

> The Court, hearing the facts of the case, Mr. Johnson did testify essentially to self-defense in this matter. While that did not rise to the level of a defense and the jury certainly didn't find that to be a defense, there was perhaps some provocation and from the testimony that we heard, the witnesses did have heated discussions and were both drunk and high during this heated discussion before the events did elevate in the way that they did. I think that can be looked at as mitigating circumstances, even though it didn't rise to the level of a defense.

Transcript at 103.

self-defense, his convictions should be reversed because he was deprived of a fair trial and due process of law." Appellant's Brief at 5.

To determine whether a defendant's due process rights have been violated by the State's failure to preserve evidence, we must first decide whether the evidence in question was "potentially useful evidence" or "materially exculpatory evidence." Chissell v. State, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), trans. denied. Potentially useful evidence is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337 (1988), reh'g denied). The State's failure to preserve potentially useful evidence does not constitute a denial of due process of law "unless a criminal defendant can show bad faith on the part of the police." Id. Bad faith is defined as being "not simply bad judgment or negligence, but rather implies the conscious doing of wrong because of dishonest purpose or moral obliquity." Wade v. State, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999), reh'g denied, trans. denied.

On the other hand, materially exculpatory evidence is that evidence which "possesses an exculpatory value that was apparent before the evidence was destroyed" and must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Chissell, 705 N.E.2d at 504 (quoting California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534 (1984)). "[W]hile a defendant is not required to prove conclusively that the destroyed evidence is

exculpatory, there must be some indication that the evidence was exculpatory." Blanchard v. State, 802 N.E.2d 14, 27 (Ind. Ct. App. 2004) (relying on Chissell, 705 N.E.2d at 504). "[W]e cannot assume that the destroyed evidence contained exculpatory material when the record is devoid of such indication." Id. Exculpatory is defined as "[c]learing or tending to clear from alleged fault or guilt; excusing." Wade, 718 N.E.2d at 1166. The scope of the State's duty to preserve exculpatory evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." Noojin v. State, 730 N.E.2d 672, 675 (Ind. 2000). Unlike potentially useful evidence, the State's good or bad faith in failing to preserve materially exculpatory evidence is irrelevant. Chissell, 705 N.E.2d at 504.

Johnson argues that the video surveillance was materially exculpatory evidence.[8] Johnson points to his own testimony and Linkon's testimony. Specifically, Johnson argues that Linkon "noted that after reviewing the store's videotape, the three men entered the store together and that the white male (i.e., Mr. Terpening) had taken and held the money from the cashier." Appellant's Brief at 7. Johnson concludes, "[a]s such, Mr. Linkon's testimony contradicts that of Mr. Terpening, who denied knowing or associating with Mr. Johnson or going to the liquor store with the third man." Id.

[8] Johnson does not argue that there was bad faith on the part of the police. Rather Johnson appears to concede that there is no evidence of bad faith. Specifically, Johnson states "Mr. Linkon's testimony regarding the store's video recording system and how he created a backup disk for the detective and prosecutor – later found to be defective by which time the images were unrecoverable – undercuts any assertion that the evidence was lost due to prosecutorial bad faith." Appellant's Brief at 7.

Linkon's statement at the trial that after viewing the videotape he knew Terpening, Johnson, and another male walked into the store together does not provide a basis to conclude that Johnson acted in self defense or that the videotape possessed an "exculpatory value that was apparent before the evidence was destroyed." Chissell, 705 N.E.2d at 504 (quoting Trombetta, 467 U.S. at 489, 104 S. Ct. at 2534). We cannot say that the video constituted materially exculpatory evidence. See Blanchard, 802 N.E.2d at 27 (holding that the lost evidence did not rise to the level of materially exculpatory evidence because it did not possess an exculpatory value which was apparent before its destruction); Laughner v. State, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002) (holding that there was no indication that the evidence was exculpatory), reh'g denied, trans. denied, cert. denied, 538 U.S. 1013, 123 S. Ct. 1929 (2003), abrogated on other grounds by Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Because the video was not exculpatory evidence and Johnson does not argue bad faith, we conclude that Johnson was not denied due process. See, e.g., Chissell, 705 N.E.2d at 504 (holding that the defendant was not denied due process where the evidence was not materially exculpatory and the defendant failed to demonstrate bad faith on the part of the police).[9]

[9] The State argues that "the surveillance video was never acquired by the police; therefore, the erasure of that video by the liquor store computer system did not implicate the Fourteenth Amendment." Appellee's Brief at 5. However, the record is unclear whether the police acquired the surveillance video. The following exchange occurred during the direct examination of Linkon:

> Q Did the detective ask you to download on a disk the recording that depicted this incident?

II.

The next issue is whether the trial court abused its discretion in sentencing Johnson. We note that Johnson's offense was committed after the April 25, 2005, revisions of the sentencing scheme.[10] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence –

A Yes, he did.

Q Did you attempt to do that?

A I think I did.

Q Can you explain that?

A I did make a back-up and at the time I was able to run those on my own computer. For whatever reason, either the wrong disk was given to you or somehow it got deleted, but I know you were unable to uncover the files that had been copied.

Transcript at 44. In any event, we need not address the State's argument because we conclude that the video was not exculpatory evidence.

[10] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005).

including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

A. Aggravator

Johnson argues that the trial court "failed to consider the remoteness in time of Mr. Johnson's earlier convictions." Appellant's Brief at 13. In effect, Johnson argues that the trial court gave his criminal history too much weight. However, "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Anglemyer, 868 N.E.2d at 491. Thus, the weight assigned to Johnson's criminal history is not subject to review for abuse of discretion.

B. Mitigators

Johnson also argues that the trial court ignored several mitigating factors that were supported by the record. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind.

1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

Johnson argues that the trial court "completely ignored" the following aggravators: (1) the victim of the crime induced or facilitated the offense; (2) there were substantial grounds tending to excuse or justify the crime; and (3) Johnson acted under strong provocation. Johnson points to his testimony that he had given Terpening money and that Terpening struck Johnson and pulled a knife on him.

Here, Terpening testified that Johnson "sucker" punched him in the mouth. Transcript at 23. The night manager testified that Johnson punched Terpening, Terpening went down, and Johnson started smashing bottles of wine over Terpening's head. The trial court stated, "I find as aggravating that this was an unprovoked attack on the victim. It was extremely violent, far beyond the bounds of anything that the situation called for in

this case." Transcript at 106. Based on the trial court's comments, we conclude that the trial court did not ignore Johnson's proposed mitigators, but rejected Johnson's version of the incident and declined to give his proffered mitigators any weight. See Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004) ("From a review of the sentencing transcript, it is clear the trial court did not ignore any of the mitigating factors proposed by Rose."). Based on the record, we cannot say that Johnson's proposed mitigators were clearly supported by the record. See McKinney v. State, 873 N.E.2d 630, 645-646 (Ind. Ct. App. 2007) (holding that the trial court did not abuse its discretion by failing to find that the victim facilitated the crime as a mitigator), trans. denied.

For the foregoing reasons, we affirm Johnson's conviction and sentence for battery as a class C felony and criminal mischief as a class A misdemeanor.

Affirmed.

NAJAM, J. and DARDEN, J. concur